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Constitutionalism in the United Kingdom

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Book Review

CONSTITUTIONALISM IN THE UNITED KINGDOM

CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT. Aileen Kavanagh.[1] Cambridge, Cambridge University Press. 2009. Pp. xiii + 455. $139.00 (Cloth), $61.99 (Paperback).

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In 1998, the United Kingdom ("UK") experienced what could plausibly be characterized as a constitutional revolution, which was described by British constitutional lawyer, Keith Ewing, as "the most significant formal redistribution of political power in this country since 1911, and perhaps since 1688."[3] Under the newly introduced Human Rights Act ("HRA"), courts in the UK were, for the first time, explicitly empowered to review UK legislation against a codified set of rights, namely those found in the European Convention of Human Rights ("ECHR"). This is an international treaty to which the UK, as a member of the Council of Europe, had long been a signatory. Before 1998, the only form of redress for UK citizens, concerned with what they claimed to be violation of their Convention rights by UK government bodies was appeal to the European Court of Human Rights in Strasbourg. This is a body whose judgments, though given some (variable) measure of respect by the official organs of the UK government and judiciary, were not considered binding under UK law. The relationship between Strasbourg and these UK domestic bodies was anything but clear, comfortable,

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3. P. 1 (quoting Keith Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 MOD. L. REV. 79, 79 (1999)).

or stable. But by incorporating the Convention directly into UK law, all that changed. Citizens were able to appeal directly to UK courts for judgments concerning the compatibility of domestic UK laws with the rights (of the ECHR) now codified in the HRA.

Those whose thoughts about the nature and justification of judicial review (or what Aileen Kavanagh prefers to call "constitutional review") have been shaped by exposure to the relatively strong form(s) it takes under an entrenched, constitutional document like the United States Bill of Rights and, to a somewhat lesser extent, the Canadian Charter of Rights and Freedoms with it's Section 33 "notwithstanding" or "override" clause, may be surprised to discover an absence, in the UK, of many familiar features. Two differences stand out: (a) the HRA is, strictly speaking, an ordinary act of Parliament and, as such, is subject to ordinary procedures of repeal and amendment; and (b) UK judges do not enjoy the more familiar authority of American and Canadian judges to "strike down" laws judged to be in violation of recognized rights. Instead, they are required to take one of the following two steps. First, in cases where legislation, as it would normally be interpreted, is judged to infringe Convention rights, UK judges are required, under Section 3 of the HRA, to provide an authoritative interpretation of the otherwise offending legislation that renders it compatible with Convention rights. Often this interpretation will be one which departs from the plain, ordinary meaning of the legislation, or from the intended meaning plausibly ascribed to its drafters. In other words, judges are required to provide an authoritative interpretation which, but for the force of Section 3, would almost certainly be condemned as forced and unnatural, or an instance of judges trying to reinvent the law under the guise of interpretation, thereby usurping a legislative role properly reserved for democratically accountable bodies like Parliament. When all efforts to provide an appropriate interpretation fail, Section 4 of the HRA requires UK judges to issue a "declaration of incompatibility," a public statement of how and why the provisions in question cannot be rendered compatible with the relevant Convention right(s). It is then up to the offending body—or more precisely, the body judged by the court to have offended the HRA—to take whatever remedial steps, *if any*, it deems appropriate. Strictly speaking, then, a declaration of incompatibility fails to disturb the legal status quo.

These features of the HRA may lead one to think that the monumental step described by Ewing was not really much of a step at all. One of Kavanagh's objectives in this splendid book is to disabuse us of this idea, while at the same time assuaging the concerns of those who fear that the HRA marks a far too dramatic departure from centuries-long UK constitutional history, in particular its long-time commitment to the principles of Parliamentary sovereignty and democracy. Kavanagh skillfully surveys the relevant case law and the official (and non-official) records of public, judicial and parliamentary debates surrounding adoption, implementation and application of the HRA. Kavanagh also succeeds in demonstrating that constitutional practice under the HRA is not as far removed from what one finds in Canada and the United States as might appear, at first glance. It is certainly not as far removed as would be suggested by a superficial understanding of the two features described above. But these changes are not so dramatic as to represent the complete abandonment of centuries-long parliamentary and democratic traditions either. Kavanagh sets out to demonstrate that the traditional, orthodox doctrine of Parliamentary sovereignty is an exaggeration, and that the strong interpretive powers granted under Section 3 of the HRA are not qualitatively different from the powers judges have long enjoyed under common law.

So why is all this the case? Consider each of the two features mentioned above, beginning with the fact that the HRA is an ordinary Act of Parliament, and therefore as formally subject to amendment and repeal as the most mundane of tax laws. As Kavanagh ably shows, the HRA is, in reality, nothing close to an ordinary statute. Given factors like the subject matter of the HRA (*human rights*), the fact that it incorporates Convention rights, which the UK has long been bound to observe as a matter of international treaty, and the world-wide trend towards the constitutionalisation of human rights coupled with fairly robust forms of constitutional review, it would be well nigh impossible for the UK Parliament to turn around and repeal or substantially amend the HRA. Tony Blair "once suggested that he would consider seeking to amend the HRA if it proved to be an obstacle to the 'war on terror'" (p. 7 n. 37), but, Kavanagh intimates, such a move would have been political suicide. Once a nation has taken the monumental step of codifying a set of human rights and placing in the hands of its courts the responsibility of overseeing and judging government

action against the standard it sets, it is very difficult to turn back. It is hard to imagine a government, whose continued existence and effectiveness depend on sustained public support from the electorate and the other official branches of the state, in effect declaring its opposition to human rights by repealing the HRA, or seriously diluting it by way of amendment. So even if there is nothing *in black letter constitutional law* to prevent either of these moves, political reality serves as a virtually insurmountable check on the exercise of the relevant legal power. For all intents and purposes, the HRA is as entrenched a part of the UK constitution as the Bill of Rights is of the United States Constitution. Only a very narrow, formalistic view of constitutions that sees their identity and content as exhausted by the formal terms of entrenched, judicially enforceable documents, would deny this constitutional reality.

Turning now to the second notable feature of the HRA—that it does not provide for the legal power to strike down legislation—we once again see Kavanagh demonstrating that appearances are deceiving. The burden of her argument is to show, via an extensive review of both pre- and post-HRA case law and practice, that the powers of review granted by the HRA are not only fully justifiable as integral parts of a democratically legitimate system of government, they are also not substantially different from powers which UK judges have exercised for centuries. Take Section 3 again, for example. According to Kavanagh,

> we should first bear in mind that section 3(1) does not give the courts radically new methods of interpretation which they did not possess pre-HRA. Judges have always possessed (and exercised) the power to rectify statutory language, if to do so would remove an injustice or violate a fundamental constitutional principle. . . . The law reports are full of (pre-HRA) cases where the courts supplied 'the omission of the legislature' to protect rights such as natural justice, or refused to follow the clear implications of statutory terms where it would deny a fundamental right or cause clear injustice. . . . [T]he ability of the courts to depart from ordinary meaning and to 'read in' and 'read down' in order to prevent a violation of [constitutional] principles, was not one judges received for the first time in 1998 (p. 115).

Section 4 of the HRA, as we have seen, requires judges to issue a declaration of incompatibility should all efforts to find a Convention-compatible reading of the relevant legislation end in

failure. Such declarations have no immediate legal effect, either for the party alleging a breach of his or her Convention rights, or for the law judged to be incompatible. The law in question retains its validity, together with its force and effect in the case at hand. But once again, there is, according to Kavanagh, much more than meets the eye. "[T]he immense political pressure to comply with declarations of incompatibility is only part of the picture. The rest of that picture is made up of legal pressures" (p. 321). Among these are the UK's obligation, under international law, to uphold Convention rights in their legal and political practices, and the fact that the UK is subject to an adverse finding of the Strasbourg Court that it stands in violation of Convention rights if it fails to live up to this obligation. Yet another factor is the status of a declaration as an authoritative (if not formally binding) pronouncement of legal principle by the nation's highest courts. Few governments will wish to be publicly tarred with the brush of violation in such circumstances. These and other factors not only explain why deference to a court's declaration of incompatibility has been observed in every single case since the HRA was adopted, it serves to explain the good sense in saying that, in effect, the powers of UK judges under the HRA are, in reality, virtually identical with the powers enjoyed by their North American counterparts. "[A]s a judicial tool to secure the protection of Convention rights in primary legislation, the declaration of incompatibility is far from weak . . . . Apart from its lack of direct remedial consequences for the individual litigant, it is very similar, both in form and effect, to a judicial 'strike-down' power" (p. 417). In short, it functions as a declaration of constitutional principle.

That one has the power to perform a particular action does not, of course, always imply that one ought to do so, any more than it follows from the fact that one has the right to speak in some particular context that one ought to do so. Nowhere is this truth more evident than in cases involving constitutional review. In Part II of her book, Kavanagh sets out to investigate how UK courts can carry out their duty to uphold Convention rights while at the same time exercising an appropriate degree of "deference" to the legislative branch. Courts and legislatures often disagree about how best to understand or interpret a particular human right provision. As a result, they often disagree as well about whether a particular legislative Act, read in the usual way, or in the way intended by those on whose initiative the Act gained its existence, is consistent with that provision. Is a

law authorizing UK government agents to subject suspected terrorists to indefinite detention, without the usual safeguards associated with natural justice and due process of law, an unwarranted violation of the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Convention, Article 6)? Any government that enacts such a law presumably does not think so, or it would not have enacted the law in the form it took. But judges often disagree, leaving them with the unenviable task of deciding how best to respond. Should they declare an incompatibility with all the attendant effects discussed above? Should they instead provide an otherwise unnatural or forced reading of the legislation, one that avoids an inconsistency with the human right provision—*understood as the judges understand it*—but does so only at the cost of seriously hindering, if not outright thwarting, the government's objectives? Or should they do nothing? The easy route is simply to say this: Judges should take whatever steps they deem necessary to enforce the relevant human rights, as they understand them. This, after all, is what they are charged with doing when they are given the power of constitutional review under the HRA. A strength of Kavanagh's analysis and defense of constitutional review under that Act is that she does not take this easy route. Instead, Kavanagh explores the nature of deference and provides a sophisticated analysis of how best to balance the demands of judicial supervision against the demands of judicial deference in a constitutional democracy. Drawing on an extensive analysis of the relevant case law, Kavanagh defends "a variable and contextual approach to determining the constitutionally appropriate degree of deference in a particular case" (p. 201). This approach "firmly rejects the idea that substantial judicial deference should be given the elected branches [of government] in a routine or blanket fashion" (p. 201). This approach also rejects outright any attempt to carve out, ab initio, certain subject areas as ones in which particular degrees of deference are either warranted or inappropriate. Whether and to what degree judges should defer to legislative decisions must be determined on a case-by-case basis, taking into account a range of different institutional and epistemic considerations bearing on the case at hand. These include: (a) the role of the judiciary as a secondary decision-maker charged not with the duty to make *primary* decisions based on an assessment of the reasons for and against an act of government, but with the *secondary*

responsibility to vet the primary decisions of others for conformity with constitutional constraints; and (b) the degree of uncertainty attached to the particular question at issue. As she sees it, "deference is a rational response to uncertainty"; "judicial deference and uncertainty have an inverse relationship: the more certainty, the less deference and *vice versa*" (p. 171). Further relevant factors include: (c) the competence and expertise of the legislature compared with the judiciary to decide on the matter in question. "When a case concerns an issue which would require widespread or radical reform of various interlinked areas of the law, a responsible judge will sometimes pay substantial deference to the superior *law-making competence* of Parliament" (p. 182); and finally (d) the superior resources, capacity, and, hence, democratic legitimacy, of the elected branches of government "to ensure that there is an acceptable reconciliation of competing social interests, when a matter is highly controversial" (p. 194). There is no easy formula to apply here. Each case must be assessed on its own terms, with full sensitivity to all the relevant factors.

This analysis strikes me as an eminently sensible one, particularly in its recognition that there are no easy cookie-cutter solutions to issues of deference. If I had one small quibble—and it is a small one—it would be that Kavanagh's analysis, with its otherwise laudable emphasis on case-by-case assessment, may underplay the relevance of the fact that what is at issue here are *human rights*. These seem qualitatively different from most, if not all, of the other social interests at play in cases involving the issue of deference. This is not to say that Kavanagh is unaware of the importance of this qualitative difference. After all, it is no doubt included under factor (c) above, the respective competencies of courts and legislatures to decide on the issue at hand, a matter she spends a considerable amount of time discussing at various points in her book. But the vital importance of human rights, and the standing temptations of governments to give them short shrift in exigent times, may warrant our treating these interests as special. Perhaps here the appropriate degree of judicial deference should be governed by fixed rules.

In the third and final part of her book, Kavanagh sets out to "tackle the big constitutional questions" (p. 8). These include the HRA's compatibility, in theory, with the doctrine of parliamentary sovereignty, as well as the array of underlying normative questions about the very justification of constitutional review in a democracy. Concerning the compatibility of the

HRA with parliamentary sovereignty, Kavanagh is at pains to stress several crucial points. Dicey notwithstanding, it is no longer (if it ever was) true that "Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised . . . as having a right to override or set aside the legislation of Parliament."[4] According the Kavanagh, "the orthodox principle of parliamentary sovereignty as stated by Dicey has very little explanatory force" (p. 316). It neither provides an accurate descriptive account of British constitutional practice, nor manages to explain and illuminate key features of that practice. Not only is Parliament subject to significant political constraints on its power to act as it pleases, the orthodox principle also "fails to account for the considerable *legal* limitations on the power of Parliament to enact laws, most obviously, those which arise from the UK's membership of the European Union" (p. 317). Union membership places the UK under the duty to recognize the superior status of EU law. Along with this comes the "necessary corollary that if an Act of Parliament comes into conflict with EU law, the former will be 'disapplied'" (p. 317). Yet another feature of British constitutional practice that counts against the orthodox view is one discussed above—the considerable interpretive powers UK judges have long enjoyed. "One of the underlying themes of [Kavanagh's] book [is] that through the traditional doctrines of statutory interpretation, the courts have *always* constrained Parliament's ability to enact legislation which violates fundamental constitutional rights" (p. 328, emphasis added). So if it was once true that the powers of Parliament were as unbridled as Dicey suggests, it seems pretty clear that this has not been true for some time now.

This brings us to the final, and perhaps most theoretical chapters of Kavanagh's book, where she tackles an array of philosophical criticisms of constitutional review in a democracy. Most of the arguments are familiar. First, judges are not Platonic kings and queens with pipelines to the truth about political morality, including those parts which deal with human rights, so why should they, as opposed to legislators, be assigned the task of discerning the truth about human rights? Second, leaving questions of fundamental human rights to be determined by judges in their chambers reduces the level of public discourse

4. P. 314 (quoting ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39-40 (10th ed., 1959)).

and debate on these important issues of political morality and, therefore, hinders their recognition and enforcement. Third, judges lack the informational resources enjoyed by legislative bodies, and are therefore in a very poor position to perform the delicate balancing required to reconcile human rights with the many other pressing social interests at stake in typical human rights cases. Finally, and perhaps most importantly, constitutional review robs ordinary citizens (and their elected representatives) of their right to participate fully in communal decision-making about fundamental matters of political morality, including the nature and proper limits of fundamental human rights. In short, constitutional review is fundamentally at odds with democracy.

In addressing these and other concerns, Kavanagh marshals an array of arguments with which readers of her work will also be well familiar. According to Kavanagh, constitutional review under the HRA is not a *substitute* for legislative decision-making on a particular set of political questions. On the contrary, Parliament retains its role as the primary decision-maker, while judges are restricted to a much narrower, different set of questions concerning the compatibility of Parliament's activities with Convention rights authoritatively adopted by the democratically accountable branches of governments. In short, constitutional review does not involve the Courts asking the very same sets of questions as the more overtly political branches and substituting their answers for those of their more democratically accountable counterparts.

> [The courts] are . . . partners in a constitutional collaboration, who are charged with the (often creative) task of furthering, determining, applying and sometimes modifying [Parliament's] will in order to achieve a Convention-compatible result. In terms of its constitutional position as the primary law-maker, Parliament is undoubtedly the senior partner. It has the power to make law on any subject, at any time, and virtually for any reason (p. 407).

A system of government in which unelected judges have the power to modify, and, in some cases, thwart the will of Parliament in the ways sanctioned by the HRA is, Kavanagh is prepared to concede, inherently undemocratic. She is not, she says, prepared to endorse what Ronald Dworkin calls the "constitutional" conception of democracy, according to which a system of government is democratic not merely because and insofar as it encompasses recognized forms of democratic

procedure (e.g., one person one vote) that are "responsive, in some meaningful way to popular opinion and input," but because it manages, in one way or another, to protect the equal moral status of all members of the relevant community. On the contrary, Kavanagh argues that democracy and justice represent two different values, and constitutional review is always purchased at "a democratic cost" (p. 368). But it is a cost well worth paying for the sake of justice to the individual. This is not its only advantage, however. Drawing on familiar arguments that unbridled democratic procedures tend to marginalize the interests of entrenched minorities, Kavanagh further argues that judicial review affords disadvantaged groups and individuals an additional—and in some cases, the only—source of access to the levers of political power. It thereby helps promote equal *effective* participation in political decision-making.

> [T]he existence of an independent tribunal to review and assess the Convention-compatibility of legislation is valuable, because it enables those groups at least to get their case heard in a forum which is relatively independent of the political power structures which may otherwise prevent them from getting to protection of their rights" (p. 378). Without constitutional review, "the idea that genuinely equal participation can be achieved simply by giving everyone the right to participate is no more than a 'pious aspiration' (p. 378).

In short, the interests underlying the democratic right to participate in political decision-making "(namely, autonomy, dignity, inclusion, etc.) are better protected by having democratic government combined with constitutional review" (p. 379). If this is so, and I believe it is, one wonders why Kavanagh so readily concedes that constitutional review is inherently undemocratic. If, absent constitutional review, many are left with *ineffective* representation, how can constitutional review be inherently undemocratic? One would have thought that, in helping to secure effective *participation*, it thereby enhances the *realization* of a properly functioning democracy. In other words, without constitutional review, the realization of democratic values remains, in most societies, "a pious aspiration."

In this review, I have managed only to touch upon the wealth of legal analysis, historical scholarship, and philosophical argument contained within Kavanagh's impressive book. Suffice to say that those who would like to learn something—or a bit

more—about the status of constitutionalism outside North American borders and who relish sophisticated, balanced philosophical analysis informed by a thorough understanding of the relevant legal practice would be well advised to read this book.